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HIEP PHAN,HONG LE

UNITED STATES DISTRICK COURT

SOUTHERN DISTRICT OF CALIFORNIA

AUREFLAM CORPORATION, a California Corporation Plaintiff, v. HIEP PHAN, individually and dba PHO HOA HIEP; HONG LE, individually and dba PHO HOA HIEP; and DOES 1 through 10, inclusive; Defendants.	Case No: 08 CV 538 LAB NLS ANSWER TO COMPLAINT OF AUREFLAM CORPORATION AND DEMAND FOR JURY TRIAL

COMES NOW Defendants HIEP PHAN and HONG LE (hereinafter referred to as "Defendants"), answers the complaint of Plaintiff AUREFLAM CORPORATION (hereinafter"Plaintiff") as follows:

JURISDICTION AND VENUE

1. Answering paragraph 1 of Plaintiff's complaint, Defendants admit that the court has subject matter jurisdiction

over plaintiff's claims under 15 U.S.C. Section 1121 and 28 U.S.C. Section 1367.

2. Answering paragraph 2, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 2 and on that basis deny them.

3. Answering paragraph 3, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 3 and on that basis deny them.

DESRIPTION OF THE PARTIES

4. Answering paragraph 4, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 4 and on that basis deny them.

5. Answering paragraph 5, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 5 and on that basis deny them.

6. Answering paragraph 6, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 6 and on that basis deny them.

7. Answering paragraph 7, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 7 and on that basis deny them.

GENERAL ALLEGATIONS

8. Answering paragraph 8, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 8 and on that basis deny them.

9. Answering paragraph 9, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 9 and on that basis deny them.

10. Answering paragraph 10, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 10 and on that basis deny them.

FIRST COUNT

11. Defendants reallege each admission and denial set forth above.

12. Answering paragraph 12, the Defendants deny the allegations contained in paragraph 12.

13. Answering paragraph 13, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 13 and on that basis deny them.

14. Answering paragraph 14, Defendants deny the allegations contained in paragraph 14.

15. Answering paragraph 15, Defendants lack information or belief sufficient to admit or deny the allegations of paragraph 15 and on that basis deny them.

SECOND COUNT

16. Defendants reallege each admission and denial set forth above.

17. Answering paragraph 17, Defendants deny the allegations contained in paragraph 17.

18. Answering paragraph 18, Defendants deny the allegations contained in paragraph 18.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(LACHES)

19. By way of affirmative defense, to the extent necessary, Defendant would show that Plaintiff's claims are barred by the doctrine of laches arising from the Defendants' 17 year continuous and conspicuous use of the contested mark and other defendants' continuous and conspicuous of the mark for over 25 years.

SECOND AFFIRMATIVE DEFENSE

(ESTOPPEL)

20. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are barred by the doctrine of estoppel arising from Plaintiff's failure to enforce its rights for over 17 years and Defendants' detrimental reliance upon said conduct.

THIRD AFFIRMATIVE DEFENSE

(ACQUIESCENCE)

21. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are barred by the doctrine of acquiescence arising from its implied consent and acquiescence to the continued use of the contested trademark by Defendants.

FOURTH AFFIRMATIVE DEFENSE

(WAIVER)

22. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are barred by the doctrine of waiver since Plaintiff expressly and implicitly waived all objections to the use and exploitation of the mark.

FIFTH AFFIRMATIVE DEFENSE

(NAKED LICENCE)

23. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are barred since they lack an enforceable trademark having granted a naked license of the contested mark to defendants' predecessor in interest.

SIXTH AFFIRMATIVE DEFENSE

(UNCLEAN HANDS)

24. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are barred by the doctrine of unclean hands for filing false information as part of its application for trademark registration.

SEVENTH AFFIRMATIVE DEFENSE

(LACK OF CONFUSION)

25. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are

barred since there is no confusion between its trademark "Pho Hoa"and Defendants' business name "Phoi Hoa Hiep".

EIGHTH AFFIRMATIVE DEFENSE

(PRIOR USE)

26. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's claims are barred since it is a junior user of the trademark.

NINETH AFFIRMATIVE DEFENSE

(FAIR USE AND PRIVILEGE)

27. By way of affirmative defense, to the extent necessary, Defendants would show that Defendants' use of the mark Pho Hoa Hiep is a nominative fair use since it is merely a generic name in the community and consequently Defendants are privileged to make such use.

TENTH AFFIRMATIVE DEFENSE

(NOT INHERENTLY DISTINCTIVE)

28. By way of affirmative defense, to the extent necessary, Defendants would show that the Defendants' mark is not inherently distinctive and has not attained secondary meaning, and purchasers do not associate the trademark in dispute with Plaintiff alone.

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ELEVENTH AFFIRMATIVE DEFENSE

(UNEXCLUSIVE OWNERSHIP)

29. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff is not the exclusive owner of the word "Pho Hoa".

TWELFTH AFFIRMATIVE DEFENSE

(LACK OF MARKET INFRINGMENT)

30. By way of affirmative defense, to the extent necessary, Plaintiff has not entered the market in which Defendant has done and is doing business. Therefore, Plaintiff lacks standing to enjoin Defendant's use of the Defendants' mark Pho Hoa Hiep.

THIRTEENTH AFFIRMATIVE DEFENSE

(SUPERIOR RIGHT)

31. By way of affirmative defense, to the extent necessary, Defendants would show that Defendants' have a superior right to the name "Pho Hoa Hiep" and "Pho Hoa".

FOURTEENTH AFFIRMATIVE DEFENSE

(VALIDITY)

32. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff's mark "Pho Hoa" is invalid and cannot be enforced.

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FIFTEENTH AFFIRMATIVE DEFENSE

(STATUTE OF LIMITATIONS)

33. By way of affirmative defense, to the extent necessary, Defendants would show that the applicable statutes of limitations bar Plaintiff's claims.

SIXTEENTH AFFIRMATIVE DEFENSE

(FUNCTIONALITY)

34. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff is barred from pursuing any action against Defendants because the aspects of the products that are alleged to be trademarked are merely functional and not entitled to trademark protection.

SEVENTEENTH AFFIRMATIVE DEFENSE

(DESCRIPTIVE)

35. By way of affirmative defense, to the extent necessary, Defendants would show that Plaintiff is barred from pursuing any action against Defendants because the alleged trademarks are descriptive only and, thus, not entitled to trademark protection.

EIGHTEENTH AFFIRMATIVE DEFENSE

36. By way of Affirmative Defense, Defendants would show that they changed the name of their restaurant to Pho Hiep and Grill.

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JURY DEMAND

37. Defendants' demand a trial by jury on all issues as allowed by the Federal Rules of Civil Procedure and the California and United States Constitutions.

PRAYER FOR RELIEF

38. **WHEREFORE,** DEFENDANTS respectfully pray that Plaintiff take nothing by way of this action and that Defendants recover the reasonable costs and attorneys' fees incurred in defending this action

Dated: July 14, 2008

s/ Larry D. Kincaid
Larry D. Kincaid
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